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IN THE

Supreme Court of the United States

No. 682

GEORGE SPECTOR, *Petitioner*,

v.

DAVID L. LADD, COMMISSIONER OF PATENTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

George Spector, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on October 26, 1961, affirming a final judgment of the United States District Court for the District of Columbia entered on April 21, 1961, affirming the order of the First Assistant Commissioner of Patents, excluding the petitioner from practice

as a patent agent in any application before the United States Patent Office, without prejudice to his registration after one year and after full compliance with the requirements of Rule 341, as in the case of one seeking registration who has not been previously registered.

JURISDICTION

The Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

I. Does the authority contained in Title 35 U.S.C. § 31, authorizing the Commissioner of Patents to promulgate regulations permit the Commissioner of Patents, as in Rule 345 of the Rules of Practice of the Patent Office, to regulate the conduct of those recognized for practice before the Patent Office, in matters which do not involve appearance before the Patent Office?

II. Does Rule 345 of the Rules of Practice of the United States Patent Office proscribe advertising by registered patent agents of any of their professional services not involved in the prosecution of the patenting of inventions?

III. Does Rule 345, which is vague and indefinite as to the scope of the term "Patent Business" effectively deny to petitioner the due process guaranteed by the Fourteenth Amendment to the Constitution of the United States by reason of its failure because of vagueness and indefiniteness to provide suitable and reasonable guides of conduct to those whose activity is regulated thereby.

IV. May The United States Patent Office, after a decision rendered upon an administrative hearing, subsequently publish and enter an order enlarging the decision rendered after hearing and which is not in conformity with said Decision?

STATEMENT OF THE CASE

Petitioner, George Spector, is a professional engineer, licensed by the State of New York and maintains offices for his engineering practice at 3615 Woolworth Building, 233 Broadway, New York City. Prior to August 10, 1960, petitioner was an agent registered to practice before the Patent Office, registration number 16,944, and maintained an office for his patent office practice at 2323 64th Street, Brooklyn, New York.

On November 16, 1959 (J.A. p. 2) and on February 4, 1960 (J.A. p. 4) the Solicitor of the Patent Office preferred charges against petitioner alleging that the petitioner had violated provisions of Rule 345 of the Rules of Practice of the Patent Office by causing to be published certain advertisements to solicit patent business. Petitioner, by affidavit, denied these charges, and, pursuant to Rule 348(d) of the Rules of Practice of the Patent Office, a hearing was held on May 10, 1960, before the First Assistant Commissioner, and which hearing, petitioner appeared *pro se*.

In his decision published June 30, 1960 (J.A. p. 50), the First Assistant Commissioner determined that petitioner be suspended from practice for a period of one year.

On August 10, 1960, by his Order No. 5308, the First Assistant Commissioner of Patents excluded appellant from practice for one year and further provided for

the registration of appellant after one year; after full compliance with Rule 341 and as in the case of one seeking registration who had not previously been registered.

In Civil Action No. 2951-60, in the U. S. District Court for the District of Columbia (J.A. p. 58) petitioner filed a petition for review pursuant to provisions of Title 35, Section 32 of the United States Code and on April 21, 1961, the District Court sustained Order No. 5308 of the First Assistant Commissioner of Patents.

Thereafter, petitioner, pursuant to Title 28, Section 1291 of the United States Code, took appeal from the decision of the District Court to the United States Court of Appeals for the District of Columbia Circuit in Appeal No. 16443 (J.A. p. 68), and on October 26, 1961, the Court of Appeals affirmed, *per curiam*, the decision of the District Court.

The petitioner admits that the advertisements shown in Exhibits A, E, and F (J.A. pp. 3, 11, 12) were placed by him in the indicated publications for the purpose of promoting his engineering practice and invention development business maintained in his Woolworth Building Offices. No evidence of probative value was adduced at any hearing to establish that petitioner obtained any employment as a registered patent agent which business was conducted from his Brooklyn offices, from these advertisements.

The decision of the First Assistant Commissioner; of the U. S. District Court and the U. S. Court of Appeals were based upon the application by the First Assistant Commissioner and the Courts of a definition of the term "patent business" as used in Rule 345

which was concluded and furnished by the Patent Office. There is no statutory or regulatory definition or explanation of the term.

ARGUMENT

The uncontroverted facts pertaining to this matter are as follows:

The petitioner, George Spector, is and at all times material hereto was, a duly licensed professional engineer of the State of New York (J.A. 4). Petitioner maintained offices for his engineering practice at 233 Broadway, New York City (J.A. 5) at which place his engineering work included mechanical engineering, development of inventions and related business. (J.A. 5). Petitioner also maintained at 2323 - 64th Street, Brooklyn 4, N. Y., an office from which he conducted a limited and separate business as a "patent agent", *i.e.*, one who prepared and filed patent applications before the Patent Office. (J.A. 5, 29). Both of these businesses were separately maintained. (J.A. 5, 29) The petitioner had not prosecuted any patent applications which resulted from advertisements placed for and by his engineering practice (J.A. 5, 29). His engineering business stopped at developing inventions (J.A. 28) and included work that is sometimes partly performed by patent agents as well as by engineers (J.A. 27, 28, 30). Charge I of the Further Charges against petitioner, dated February 4, 1960, which charge alleged that petitioner falsely informed (Patent Office) officials that the advertisement shown in Exhibit "A" (J.A. 3) of the prior charges dated on November 16, 1959, (J.A. 2) had not been employed to solicit patent business, including preparation and prosecution of applications for patent, was dismissed.

(J.A. 55). Petitioner does not seek to advance the argument that the administrative agency may not inquire into the technical or professional qualifications of an applicant or licensee or to the moral character of such an individual or to his personal conduct in appearances before the agency or in cases wherein a patent agent has been retained actually to represent a client before the Patent Office and prepare an application for filing. Petitioner does, however urge that an administrative agency may not superimpose on or extend its jurisdiction and concepts to a person in relation to other matters over which the agency has no jurisdiction, nor to usurp the function of the Court in matters of interpretation and application of the general law.

Petitioner did cause the advertisements shown as Exhibits A, F, J, to be inserted in certain publications. (J.A. 4, 14).

It is further noted as a matter of uncontroverted fact in the record that engineers and other individuals, not admitted to practice before the Patent Office, perform services in connection with inventions which are done by individuals not necessarily registered with the Patent Office and related to the obtaining of patents, for example searches and engineering work in connection with the drafting of claims. (J.A. 13, 14, 27, 34)

The Patent Office Has No Authority to Issue Rules Governing the Activities of Persons Engaged in a Bona Fide Business Which Is Not Before the Commission and Which Business Is Not Antithetical to Enrollment as a Licensed Patent Agent.

It has long been established that the power and authority of the Commissioner of Patents and those public officials similarly situated to prescribe regula-

tions is founded only in statute. 42 Am. Jur. 316, § 16. With regard to the prescription of regulations, 35 U.S.C. 31 provides in pertinent part, that: "The Commissioner . . . may prescribe regulations governing the . . . conduct of agent, attorneys, or other persons *representing applicants or other parties before the Patent Office.*" (emphasis supplied). It is to be noted that the grant of power extends to regulating the conduct of those representing applicants or other parties before the Patent Office. The statute omits any reference to the prescription of rules for persons who are *admitted to practice* and addresses itself only to the active sense of *agents, attorneys* and persons *representing applicants* and others *before* the Commission. (emphasis supplied). Thus, the extent of the Rule-making power can be construed to reach only to the Commission's authority to govern what takes place in connection with the prosecution of Patent applications before that body. The grant of power to an administrative agency is much more limited than the conduct or control and regulation of professions.

An administrative agency necessarily can be concerned only with the matters properly before it. It cannot, and should not, as a matter of sound policy be permitted to extend its jurisdiction over all of a person's lawful activities; activities in which many rules, practices and jurisdictions may obtain and govern.

Recognition of the limited interpretation of agency power is to be found in Rule 341 of the Commission's Regulations wherein the Register of Qualified Persons is limited to those persons as are recognized "as entitled to represent applicants *before* (emphasis supplied) the Patent Office in the preparation *and* (emphasis supplied) prosecution of applications for

patents." It follows then that those persons who represent applicants (or others) in the preparation and prosecution of applications for patent before the Patent Office are those over whom jurisdiction is asserted by this agency. The Rule is self-limiting to extend only to patent practitioners before the Patent Office and *a fortiori* other Rules cannot go beyond this jurisdiction. Indeed, under the law applicable to the instant case, such a limitation appears to have recognition; the Patent Office on its own, dismissed Count 1 of the Charges against petitioner dated February 4, 1960 for it could be argued that if there were ever any determinable basis to the charges, then Exhibits B, C, and D, (J.A. 7, 8-9, 10) at the very least, could have been taken to form a basis to conclude that petitioner solicited "patent business" within the meaning of Rule 345 in that in these said correspondence petitioner did advertise to solicit business in connection with the engineering development of a client's invention idea prior to the filing of a patent application by the inventor himself. The failure to link the Letter (Exhibits B, C, D, J.A. 7, 8-9, 10) with Exhibit "A" (J.A. 3) at the hearing and review would not have been material under the theory espoused by the Commissioner of Patents and the Courts below as to what constitutes "patent business." No such finding of fact or interpretation was ever made.

It is submitted, therefore, that the jurisdiction of the Commissioner of Patents to prescribe regulation of the conduct of a class of individuals does not go to regulating agents in pursuits other than when they are acting before the Patent Office in the capacity as a registered agent or attorney under existing legislation. In the instant case, petitioner is engaged in a profes-

sion, licensed and regulated by the State of New York. It has never been contended that he has (a) conducted himself in his licensed profession in any unlawful or in other than a proper manner, and (b) it has never been contended that petitioner was subject to disciplinary measures by reason of his conduct as a patent agent. It can only be concluded that the Commissioner of Patents takes the position that petitioner, in properly advertising his engineering and developmental services in one business is in some manner soliciting in an improper manner "patent business" for himself as a patent agent.

The Rule of Law Asserted by the Commissioner of Patents and Approved by the Courts Below Is in Error in That It Unreasonably Deprives Petitioner of Due Process in His Right to Conduct His Engineering Business and to Act as a Patent Agent.

As noted above, persons other than those registered with the Patent Office perform services and work in connection with the development of invention ideas in order to prepare them so that an inventor may seek patent protection, or even to determine if such protection may be available. These services are separate, non-professional; usually technical, but nonetheless vital to the inventor and are performed by those who may be other than members of the Patent Bar. The record discloses (J.A. 27, 28, 34) that many corporations and businesses hire professional engineers to perform those functions on a full-time or staff basis which petitioner, Spector, conducts on a public basis from his Woolworth Building Office. Indeed, not every patent attorney has the qualifications of an engineer. (J.A. 28)

To attempt to do what the Commissioner of Patents here seeks to accomplish is to establish a Rule of Law

that because petitioner is registered as a patent agent before the Patent Office, he may not, as has been his established right for many years, solicit for his engineering business. This contention is of a completely arbitrary nature since it disqualifies petitioner from remaining a patent agent and engaging in his other lawful occupation which he has maintained as a separate business. (J.A. 5, 29). It has long been recognized that a business or occupation is a property right which is entitled to protection. See, *Louis K. Liggett Co.* v. *Baldridge*, 278 U.S. 105, 73 L. Ed. 204, 49 S. Ct. 57 (1928); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 76 L. Ed. 747, 52 S. Ct. 371 (1932).

Although petitioner is a non lawyer and the concept with which here the Court is confronted does not involve the commonly accepted impositions of legal professional ethics, inasmuch as appellee seeks to focus in many aspects, identical standards and precedents upon petitioner and because so much of the considerations of the courts have involved attorneys, it seems pertinent to indicate that the lawyer who often finds himself required to engage in non-legal, commercial endeavors in order to support himself and that in so doing, has on occasion had to come to grips with the problem of compliance with the strict requirements of the Canons of Legal Ethics and the insistant demands of the market-place, and in endeavoring to resolve the two has been confronted with disciplinary action by the Courts. In the often cited case of *Re William A. Thiboau* (Mass.), 3 N.E. 2d 749, (1946), 106 ALR 542, the Supreme Judicial Court of Massachusetts recognized the salutary Rule in discussing the right to regulate an attorney's professional conduct that:

> "On the other hand commonly a member of the Bar is free to engage in commercial pursuits of an

honorable character and to advertise and to extend his purely mercantile business honestly and fairly by ordinary commercial methods."

It is respectfully submitted, therefore, that any interpretation of Rule 345 and the law pertaining thereto, that any solicitation of business, admittedly connected with the process of developing inventions which may or may not be patentable, but not actually concerned with appearing before, or representation before the Patent Office, or obtaining a patent before the Patent Office, deprives the petitioner of his right to employ not only his qualifications as a patent agent, but also his efforts as a licensed professional engineer. It is the petitioner's right to engage in both types of activity so long as the lawful pursuit of his engineering business is not used for the actual solicitation of the business of representing inventors before the Patent Office, there is no conflict between these two legitimate and honorable callings and none has been established. The logical extension of the rule sought to be enforced herein is that all persons who are soliciting patent business before the Patent Office and may be performing supplemental services which some patent agents or attorneys could not provide are subject to the Patent Office's regulation with respect to matters which are not within the jurisdictional concern or province of that agency. This concept could well be a stepping stone to try to change the nature of the patent business and services performed in connection therewith as it has evolved and is firmly rooted in the business life of this country. If services such as petitioner performs are patent business and preparation of patent applications then persons not registered would be subject to criminal prosecution under 35 U.S

33. It is therefore submitted that the Commissioner of Patents and the Courts below erred in the application of a Rule of Law which concluded that the appellant was guilty of misconduct for advertising a business which he carried on separately, distinctly and in a non-interrelated manner.

Patent Office Rule 345 Is Violative of Due Process in that It Sets Forth Vague and Insufficient Standards.

Such business or commercial ventures as have been carried on during the long history since the establishment of the Patent Office have of necessity had inherent and overlapping functions between all of the individuals whose efforts must be employed between the conception of a possibly patentable idea and the issuance of letters patent. There are qualified agents and patent attorneys who actually practice before the Commissioner of Patents and many persons who perform preliminary or detailed searches, construct models, make engineering surveys, analysis, development, those who make mechanical drawings and an infinite variety of services required. All of these various separate functions are connected with the business of obtaining a patent in the broadest sense. However they may overlap, they are nonetheless distinguishable from the carrying out of patent business by means of appearing in a representative capacity before the Patent Office. The Commissioner of Patents has not sought to regulate the activities of the many offerors of services as typified by the advertisements shown in Exhibits E, F, and A (J.A. 11, 12, 3) who perform many of these related services. Such persons are not required to register or enroll themselves at the Patent Office and are free to solicit business. Therefore, when such a person, who is a registered agent,

also conducts a separate service business which provides the aforementioned related services (but not services which come before the Patent Office in a *representative capacity*), the mere inclusion by the Patent Office in Rule 345 of the term "patent business" is arbitrary because of its vagueness; it makes no distinction or any delineation as to what constitutes "patent business" insofar as the patent agent or attorney is concerned. There is no guideline established as to how such person may conduct himself in some ancillary occupation and act in any capacity other than that of agent or attorney before the Commission and no mechanism is set up by which guidance may be obtained. Rule 345 as it stands, is a trap for the unwary being susceptible to no objective standards of interpretation or rule of general application in the context of the broad patent field. It is submitted that the mere proscription of a solicitation of "patent business" is too broad and too vague for a patent agent or attorney reasonably to guide his standards of conduct in other related pursuits; the rule as interpretated now by the Commissioner of Patents and the Courts below does not define the area in which patent practitioners who are otherwise qualified to perform related services may engage in their business and the common practices thereunder without subjecting themselves to disciplinary action within said rule. To the end that vagueness of the nature set forth above constitutes a violation of due process, see, *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 70 L. Ed. 1059, 46 S. Ct. 619; (1926); *Connally* v. *General Construction Co.*, 269 U.S. 385, 70 L. Ed. 322, 46 S. Ct. 126 (1926).

Evidence Adduced at the Patent Office Hearing of Petitioner Was Insufficient to Establish the Requirements of Due Process so as to Prove the Charges of the Commissioner of Patents.

The Commission and the Courts below erred in their determination that the advertisements (Exhibits A, E and F) (J.A. 3, 11, 12) were on their face, a solicitation of "patent business." The portions of the advertisements which allegedly proved a solicitation of "patent business" were taken out of context and did not in any instance refer to the procuring of or preparation and filing and making of applications for patents and in their context were always modified by the fact that petitioner held himself out to the public in the offering of his services only as a licensed professional engineer. Petitioner submits that to say that words which describe what a licensed professional engineer could do for an inventor is to be held to be a solicitation of "patent business" for petitioner's separately maintained business of acting as a "patent agent" is erroneous in the absence of establishment of a direct connection. No such connection was ever established and, at the time of petitioner's hearing, the initial charge pertaining thereto was dismissed. (J.A. 55)

Petitioner therefore submits that evidence adduced at the aforementioned hearing does not tend to establish any misconduct by the petitioner in connection with his carrying out of his business as a registered patent agent since his advertising is connected only with his separate engineering business. To say that the evidence adduced does any more than that is clearly erroneous. Petitioner is denied his due process if such inadequate and insufficient evidence is to be used as a basis for holding that he represented himself to the public as carrying on a "patent business" as a patent agent.

The Order of the Commissioner of Patents No. 5308, dated on August 10, 1960, Is Violative of Due Process and Is Arbitrary and Should Have Been Reversed on Review in that It Was Not in Conformity With the Decision of the Commissioner of Patents Dated June 30, 1960.

Petitioner, by order, dated August 10, 1960, was excluded from practice for one year and thereafter would be permitted to make a new application *de novo* (J.A. 57); the effect of such order was to disbar and exclude petitioner from practice before the Patent Office. The issuance of such order was not only arbitrary because of the lack of evidence to support the charge and unnecessarily harsh, because the instant case was one of first impression on a newly adopted and vague rule, but the order was arbitrary and violative of due process on its face because it went beyond the decision dated June 30, 1960 and was not in conformity with said decision; and no further hearing was had to establish grounds for the enlargement. Under 35 U.S.C. 32, the Commissioner has the power to either suspend or expel but herein he first did the one and later issued the order doing the other without further hearing.

The decision called for only a suspension of one year which would mean automatic reinstatement at the expiration of the suspension (J.A. 56); the order exceeded this, went further and was, in effect, a disbarment.

It is submitted that the Courts below, in review, further erred in not correcting this defect when they summarily upheld the Patent Office Order.

CONCLUSION

It is respectfully submitted that the courts below erred in affirming the order of the Assistant Commissioner of Patents as a matter of law and effectively denied petitioner of his constitutional rights to due process.

Respectfully submitted.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16443

GEORGE SPECTOR, APPELLANT

v.

DAVID L. LADD, Commissioner of Patents,
APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided October 26, 1961

Mr. Quayle B. Smith for appellant.

Mr. S. Wm. Cochran, Attorney, United States Patent Office, with whom *Mr. Clarence W. Moore*, Solicitor, United States Patent Office, was on the brief, for appellee. *Mr. Jack E. Armore*, Attorney, United States Patent Office, also entered an appearance for appellee.

Before EDGERTON, WASHINGTON and BURGER, *Circuit Judges*.

PER CURIAM: The Solicitor of the Patent Office charged appellant, an authorized "patent agent", with violating Patent Office Rule 345 which forbids advertising. We sustained the rule in *Evans v. Watson*, 106 U.S.App.D.C. 108, 269 F.2d 775, *cert. denied*, 361 U.S. 900.

The First Assistant Commissioner of Patents held a hearing. Appellant testified that he had not himself filed any patent applications which resulted from his advertisements, and did not know that any were on file, but had aided in preparing five or six such applications. The

Assistant Commissioner dismissed for lack of evidence the Solicitor's charge numbered 1, filed February 4, 1960, but sustained two charges of advertising and ordered appellant excluded "from practice as a patent agent in any application before the United States Patent Office, without prejudice to his registration after one year and after full compliance with the requirements of Rule 341, as in the case of one seeking registration who had not previously been registered."

Appellant applied to the United States District Court for the District of Columbia for review. The court held a hearing and on April 21, 1961 entered an order sustaining the Patent Office, from which this appeal is taken. —— F. Supp. ——. We find no error.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 682

GEORGE SPECTOR, PETITIONER

v.

DAVID L. LADD, COMMISSIONER OF PATENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-2a) is reported at 296 F. 2d 420. The unreported order of the District Court for the District of Columbia appears in the Joint Appendix, p. 68.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1961. The petition for a writ of certiorari was filed on January 22, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in light of the evidence of record, the court of appeals and the district court correctly re-

fused to set aside an order of the Commissioner of Patents excluding petitioner from practice before the Patent Office for violation of the Patent Office Rule forbidding advertising by patent agents.

STATUTES AND RULES INVOLVED

1. 35 U.S.C, 31 and 32 provide:

> § 31. Regulations for Agents and Attorneys.
>
> The Commissioner, subject to the approval of the Secretary of Commerce, may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office, and may require them, before being recognized as representatives of applicants or other persons, to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office.
>
> § 32. Suspension or Exclusion From Practice.
>
> The Commissioner may, after notice and opportunity for a hearing, suspend or exclude, either generally or in any particular case, from further practice before the Patent Office, any person, agent or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who does not comply with the regulations established under section 31 of this title, or who shall, by word, circular, letter, or advertising, with intent to defraud in any manner, deceive, mislead, or threaten any applicant or prospective applicant, or other person having

immediate or prospective business before the Office. The reasons for any such suspension or exclusion shall be duly recorded. The United States District Court for the District of Columbia, under such conditions and upon such proceedings as it by its rules determines, may review the action of the Commissioner upon the petition of the person so refused recognition or so suspended or excluded.

2. Rules 344, 345 and 348 of the Patent Office Rules of Practice in Patent Cases, 37 C.F.R. 1.344, 1.345 and 1.348, provide in pertinent part:

1.344 Professional Conduct.

Attorneys and agents appearing before the Patent Office must conform to the standards of ethical and professional conduct generally applicable to attorneys before the courts of the United States.

1.345 Advertising.

(a) The use of advertising, circulars, letters, cards, and similar material to solicit patent business, directly or indirectly, is forbidden as unprofessional conduct, and any person engaging in such solicitation, or associated with or employed by others who so solicit, shall be refused recognition to practice before the Patent Office or may be suspended, excluded or disbarred from further practice.

(b) The use of simple professional letterheads, calling cards, or office signs, simple announcements necessitated by opening an office, change of association, or change of address, distributed to clients and friends, and insertion of listings in common form (not display) in a classified telephone or city directory, and

listings and professional cards with biographical data in standard professional directories shall not be considered a violation of this rule.

(c) No agent shall, in any material specified in paragraph (b) of this section, or in papers filed in the Patent Office, represent himself to be an attorney, solicitor or lawyer.

§ 1.348 Suspension or disbarment proceedings.

Except as otherwise provided, proceedings for suspension, disbarment, or exclusion from practice are before a Commissioner.

STATEMENT

Petitioner seeks review of an order of the Commissioner of Patents excluding him from practice as a registered agent before the Patent Office for a period of one year for his violation of Rule 345 of the Patent Office Rules of Practice in Patent Cases (37 C.F.R. 1.345, *supra*, p. 3), which prohibits the use of advertising to solicit patent business by a registered attorney or agent (J.A. 57).

The exclusion has not yet been put into effect. The petitioner obtained orders from both the district court and the court of appeals staying the exclusion while this action was pending before each of those courts. A further stay pending the filing of a petition for certiorari was refused by the court of appeals, because of petitioner's failure to comply with terms of the previous order that had conditioned the earlier stay on his discontinuance of advertising. Application for a stay was thereupon made to this Court. The Patent Office has agreed to stay the exclusion until seven days after this Court acts on the petition for certiorari.

THE ADMINISTRATIVE DETERMINATION

The Solicitor of the Patent Office, on November 16, 1959, preferred the following charge against petitioner (J.A. 2):

> That, in violation of Rule 345 of The Rules of Practice of the United States Patent Office in Patent cases, you caused to be published an advertisement to solicit patent business for you appearing on page 63 in the November, 1959 issue of Popular Mechanics, a photocopy of that page with the advertisement encircled being marked Exhibit A and being attached hereto and made a part hereof.

The advertisement therein referred to read as follows (J.A. 3):

> INVENTIONS, Ideas, patents wanted! By manufacturer. Cash, royalties. Sales promotions, invention development. George Spector, licensed professional engineer. 2615 Woolworth Building, New York.

On February 4, 1960, the Solicitor charged an additional violation of the rule, asserting (J.A. 6):

> That, in violation of Rule 345 of the Rules of Practice of the United States Patent Office in Patent cases, you caused to be published advertisements appearing on page 242 of the January 1960 issue of Popular Science Monthly and on page 1243 of the Manhattan Yellow Pages 1960, photocopies of such pages being marked, respectively, Exhibits E and F, and attached hereto and made a part hereof.

Exhibit E, referred to in the above charge, included the following advertisements, appearing both

under the heading, "For Inventors," and under the heading, "Inventions Wanted" (J.A. 11):

> INVENTORS' Complete Service. Cash–Royalties Sales. Inventions Researched. Patent Development Engineering. Free Invention Certificate. George Spector. Licensed Invention Engineer. 3615 Woolworth Building; New York.

The advertisement introduced as Exhibit F was an offer by George Spector, "Licensed Professional Engineer," of "INVENTORS' COMPLETE SERVICE," including the statement: "INVENTIONS AND IDEAS RESEARCHED AND FULLY PROTECTED" (J.A. 12).

A hearing was held on May 10, 1960, before the First Assistant Commissioner of Patents in compliance with Rule 348 of the Rules of Practice of the Patent Office, to consider the charges preferred by the Solicitor (J.A. 15). Petitioner contended that he placed the advertisements in his capacity as a Professional Engineer, and not as a Patent Agent (J.A. 33–35). To refute this assertion, the Solicitor offered into evidence, in addition to the exhibits already referred to, several pieces of correspondence allegedly mailed by petitioner to clients while acting as a Professional Engineer, one of which offered to "provide all or any of the services that an inventor requires in protecting and promoting his invention" (J.A. 7). In another, petitioner stated, "I therefore recommend that you let me proceed with the patent development required for the filing of a U.S. Patent Application" (J.A. 10). Petitioner testified

that in his business as Professional Engineer he performed a number of functions with respect to applications for patents, such as the drafting of claims and conducting patent searches, and on cross-examination he conceded that he had prepared a number of patent applications in response to the advertisements shown in the exhibits or to similar advertisements (J.A. 30, 34–35).

On the basis of the foregoing, as well as of additional evidence adduced at the hearing, the First Assistant Commissioner of Patents on June 30, 1960, issued an opinion in which he concluded (J.A. 54) that:

> Examination of the advertisements in Exhibits A, E and F makes it clear that these advertisements offer services in connection with the patenting of inventions. In particular, the reference to "INVENTOR'S Complete Service" and "Inventions Researched. Patent Development Engineering" in Exhibit E and to "INVENTORS' COMPLETE SERVICE," and "INVENTIONS and IDEAS RESEARCHED and FULLY PROTECTED" in Exhibit F indicate that the service offered involves protecting unpatented inventions by aiding in obtaining patents. Moreover, the evidence, including the concessions of respondent, establish that respondent has actually performed acts constituting "patent business," including conducting preliminary searches, giving advice as to filing patent applications, and preparing drawings, specifications and claims of patent applications, as a result of the advertising.

He therefore decided that petitioner should "be suspended from practice before the Patent Office for a period of one year"; however, he temporarily withheld issuance of an order so that petitioner could make arrangements for the prosecution of applications for which he was then responsible (J.A. 56). On August 10, 1960, the First Assistant Commissioner's order was issued, excluding petitioner "from practice as a patent agent in any application before the United States Patent Office, without prejudice to his registration after one year and after full compliance with the requirements of Rule 341, as in the case of one seeking registration who had not previously been registered" (J.A. 57).

2. THE DISTRICT COURT'S DETERMINATION

Pursuant to 35 U.S.C. 32, the petitioner sought review of this exclusion order in the district court (J.A. 58). After reviewing the evidence, the district court fully sustained the order of exclusion, finding, *inter alia* (J.A. 65–66):

> 8. The advertisements in Exhibits A, E, and F offer, on their faces, services in connection with the patenting of inventions.
>
> 9. The advertisements in Exhibits A, E, and F offer, on their faces, services which are usually performed by patent attorneys and patent agents for their clients.
>
> * * * * * *
>
> 11. By his own admissions and as shown by Exhibits B, C, D, G, H, I, K, and L, petitioner has offered to perform and has performed for those responding to his advertisements, such

> as those in Exhibits A, E, and F, services in connection with the patenting of inventions usually performed by patent attorneys and patent agents for their clients.

The district court concluded that "[t]he making of preliminary searches and the preparation of applications for patent constitute 'patent business' as that term is used in the said Rule 345"; and that the order of the First Assistant Commissioner of Patents was supported by "reliable, probative, and substantial evidence" and should be sustained (J.A. 66, 67).

On appeal, the United States Court of Appeals for the District of Columbia Circuit unanimously affirmed *per curiam* (Pet. 1a-2a).

ARGUMENT

The basic question presented by this case is a narrow and factual one. Moreover, the concurrent decisions of both courts below are clearly correct. Further review, we submit, is not warranted.

1. The main issue here is one of fact, *i.e.*, whether petitioner's advertisements constituted the solicitation of patent business. After a full hearing, the Commissioner of Patents concluded that they did. The correctness of this factual determination, by the administrator charged with the implementation of the statute, has already been affirmed by both courts below. Under the applicable Patent Office rule, the validity of which has already been fully established (see p. 11, *infra*), it follows that petitioner was properly excluded from practice. No additional review of that exclusion is called for here.

2. Moreover, the record conclusively demonstrated that petitioner was engaging in conduct properly prohibited by the rules of the Patent Office. Petitioner's advertisements emphasized the completeness of the service he offered for the protection of inventors. His responses to individuals who wrote him elaborated upon this promise and specifically offered to undertake the initial steps in obtaining a patent. The evidence clearly established that petitioner in fact performed work that is ordinarily performed by patent attorneys and agents, and he himself conceded that he had prepared patent applications in response to the advertisements in question. The record could scarcely be clearer to the effect that petitioner was soliciting patent business in violation of Patent Office rules.

The applicable statute expressly gives the Commissioner authority to "prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office * * *." 35 U.S.C. 31. Practice before the Patent Office is professional in nature and requires conduct consistent with high professional standards, which Congress has made the Commissioner of Patents primarily responsible for enforcing. *Kingsland* v. *Dorsey*, 338 U.S. 318. The Commissioner's Rule 345 provides essentially that each practitioner before the Patent Office shall be held to the same standard of professional conduct in regard to advertising as that required of lawyers, dentists, physicians, public accountants and architects, and there can be no real doubt here that petitioner's con-

duct fell short of the standards established by that rule.

It is no answer to suggest that the application of Rule 345 must be limited to advertisements specifically offering services in connection with "the prosecution of Patent applications before" the Patent Office (Pet. 7). So to restrict Rule 345 would render it so susceptible of evasion as to undermine its whole purpose. In any event, the particular services offered by petitioner, as described more fully above, are so closely identified with the prosecution of patent applications that they plainly fall within even the narrow definition of Rule 345 urged by petitioner.

3. Petitioner now seeks to raise for the first time the contention that Rule 345 is governed by vague and insufficient standards (Pet. 12–13). Since this point was raised neither before the administrator, the district court, nor the court of appeals, it would not seem to be open at this late date. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37. Moreover, the contention is wholly without merit. There can be no serious challenge to the validity of the regulation. Less than three years ago, in *Evans* v. *Watson*, the validity of Rule 345 was fully sustained by the Court of Appeals for the District of Columbia Circuit, 269 F. 2d 775, and this Court denied certiorari, 361 U.S. 900.[2]

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[2] Petitioner's contention (Pet. 15) that the First Assistant Commissioner's final order (dated August 10, 1960) was "not in conformity" with his decision and opinion (dated June 30, 1960) is entirely unfounded. In his decision, the First Assistant Commissioner announced that he would subsequently

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1962.

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issue an order suspending petitioner from practice before the Patent Office for a year (J.A. 56). When issued, that order, which "excluded" petitioner "from practice * * * without prejudice to his registration [as a patent agent] after one year" (J.A. 57), was clearly within the scope of the First Assistant Commissioner's decision. Petitioner has pointed to no substantive difference between suspension from practice for a year and exclusion from practice for a year, nor is there any. Surely the fact that petitioner's return to practice was here conditioned on his complying with the requirements for a *de novo* application for registration is not such a difference, for relief from suspension could certainly be similarly conditioned. It should further be noted that petitioner did not raise this contention before the Commissioner of Patents nor in either of the courts below.

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No. 682

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

GEORGE SPECTOR, *Petitioner*

v.

DAVID L. LADD, Commissioner of Patents, *Respondent*

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The petitioner herein, by his attorneys, respectfully submits this Reply Brief pursuant to Part 4, Rule 24 of the Rules of The Supreme Court of the United States and states this Honorable Court as follows:

1. Directing the attention of The Court to respondent's brief in opposition (Facts; p. 6), the respondent states, quoting in part from the transcript of a Patent Office Hearing, that (one of the petitioner's correspondence with a client) "... offered to 'provide any or all of the services that an inventor requires in protecting and promoting his invention:' (J.A. 7)". This statement, quoted in respondent's brief has omitted to include the fact that the quoted statement was qualified by, "... as indicated in my above letterhead." (J.A. 7) and that the letterhead to which reference was made was the letterhead of the petitioner, Spector, and that said letterhead referred to petitioner only as a licensed professional engineer and mentioned developmental work which work comes within recognized and legitimate engineering activities.

2. Further directing the attention of The Court to the brief of respondent (p. 11) and to respondent's contention that the petitioner's argument to the effect that Patent Office Rule 345 was vague and governed by insufficient standards and that this argument had not been presented below (Petitioner's Brief, pp. 12-13), petitioner states that on the contrary, this point was renewed by him at every stage of the proceedings:

(a) At the hearing held before the First Assistant Commissioner of Patents (J.A. 27), petitioner raised this point in a response to the Solicitor of the Patent Office as follows:

> "I make no attempt here to deny that I am doing work which is partly performed by patent attorneys and patent agents. There is no denial here. I think it is very clear that I am performing the services, but I do, my interpretation of that Rule 345 (d) is it? I do not know whether

it is "a" or "b" the words, "Patent Business" is used. If the words "Patent Business," if it was intended to define exactly what it was, why wasn't it defined in that Rule? In other words, why did they not itemize all the various things that Patent Business includes? That is so broad, that phrase "Patent Business" is so broad that it includes services legitimately performed by professional engineers."

(b) In the U.S. District Court for the District of Columbia, petitioning for review of the case in entirety, pursuant to 35 U.S.C. 32, petitioner again raised the question (J.A. 58-61).

(c) In the U.S. Court of Appeals for the District of Columbia Circuit, petitioner presented this question, and in his brief therein (p. 8) and argument, it was stated, "The corrollary proposition to this requirement of clear legal proof as unprofessional conduct *should be clearly defined and non-susceptible of varying construction.*" (Emphasis supplied.)

The petitioner submits that he has repeatedly urged this point to the Patent Office and to the Courts; that it is cogent, material and relevant, and as set forth in the language adopted by the court in *Parks* v. *Libbey-Owens-Ford Glass Co.*, 360 Ill. 130, 195 N.E. 616, (1935), "Statutes which either forbid or require doing of an act in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application transcend "due process of law".

The respondent, in his brief in opposition, (p. 11) cites *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37 (1952) in support of his conclusion that the petitioner may not properly raise the issue that Patent Office Rule 345 is governed by vague and insufficient

standards. Having reviewed the factual inaccuracies of respondent's position above, with respect to the holding of The Court in the *Tucker* case, petitioner submits that the decision in *Tucker* was a narrow and self-limited one and clearly distinguishable from the case at bar. In *Tucker*, as was pointed out by The Court, the sole question being considered was the validity of an objection to the improper appointment of an I.C.C. hearing examiner which objection was first made on petition for certiorari. The majority of The Court held that inasmuch as the examiner was a qualified one and that the hearing had been conducted in accordance with established rules and that no objection had been timely made the decision would stand. No similar circumstances attend the instant case nor do any applicable legal principles relate thereto. Petitioner submits that the doctrine of *Tucker* is applicable neither in fact nor governing principles of law and therefore supports none of the conclusions respondent seeks to draw therefrom.

3. Directing the attention of the Court to the argument of the respondent (p. 11, respondent's brief in opposition), respondent concludes that Patent Office Rule 345 is unassailable for two reasons. The first reason is that the Patent Office having been sustained on review by the U.S. District Court and affirmed by the U.S. Court of Appeals has maintained a firm proposition and secondly, the respondent argues that *Evans v. Watson*, 269 F. 2d 775 (D.C. Ct. App. 1959), *cert. den.* 361 U.S. 900, (1959) sustains this proposition. A review of *Evans* reveals that the action in that case was by way of injunction, it being sought to prohibit the Commissioner of Patents from the issuance of the regulation in question prohibiting advertising in a reversal of over 75 years of

prior practice. This was the entire issue for the consideration of the courts. It is readily apparent that the courts in *Evans* engaged in merely equating the regulation (Rule 345) to the regulations of various other Government agencies; no consideration was given as to the context of the regulations in the light of general patent practice or of any related services, e.g., engineering services as performed by petitioner in the instant case or as are performed on a continuing basis by many non-registered individuals and organizations. No consideration was given in *Evans* to any particular state of facts on their merits, or as to how the regulation was to be interpreted or applied. In the instant case, however, the reasonableness and definiteness of this particular regulation is under review for the first time and subject to an actual set of facts in a given situation. It is in the instant case that the issue of whether the Commissioner of Patents can regulate conduct which may be closely connected with the preparation of inventions for further patent effort (but which does not actually involve practice before the Commission) and, if the Commissioner of Patents can do so, whether Rule 345 is sufficiently definite and certain to accomplish the apparent objects without being violative of the requirements of due process. See, *Parks* v. *Libbey Owens Ford Glass Co., supra.* In order to follow and apply the argument advanced by the respondent, one is forced to first adopt respondent's conclusion that the application of Rule 345 in the instant case is a correct one because (a) the First Assistant Commissioner of Patents has so determined, and (b) the determination was sustained by the District Court and Court of Appeals, and then, to reason back to the premises. The *Evans* case held no more than that the Commissioner of Patents had proper statutory authority

to promulgate regulations in connection with practice before that agency. To proceed further under the circumstances and apply the argument of respondent to the holding in *Evans* defies the fundamental and accepted rules of logic and attributes more to *Evans* than is contained in the decision. The petitioner does not now and has never urged that the Commissioner lacked the power or authority to promulgate reasonable rules of practice before his agency; it is the petitioner's contention that, in the exercise of this rule-making authority that the Commission must comply with reasonable, objective standards of the actual conduct of patent practice and be sufficiently definite to permit their reasonable interpretation and application.

The respondent, in addition to ignoring the established working patterns of services ancillary to patent practice before the Commission, has herein equated these ancillary services, performed by the petitioner and others over a period of many years, to the regulation of the learned professions. Petitioner submits that an individual has a legitimate right to practice an engineering profession separately, which may concern itself with research, technical study and services, development and other related matters connected with inventions and to advertise these services, without being deprived of the privilege of that same individual to engage in a separate practice as a licensed patent agent.

4. In respondent's brief in opposition, in a footnote (2) beginning on page 11, respondent now advances a view that there is no substantive difference between *suspension* from practice and *exclusion* and concludes that there is none. Title 35 U.S.C. Section 32, is entitled SUSPENSION OR EXCLUSION FROM PRAC-

tice. All of the language used in this section states *suspension* or *exclusion* as alternatives. It would appear to be a wholly unwarranted assumption, whatever rules of construction or interpretation be applied to this language that it was intended that they be read as being synonymous. In Webster's Collegiate Dictionary (5th Edition) it is stated that *exclude* means "to hinder from entrance, to refuse participation, enjoyment, consideration or inclusion, to eject; expel. Webster further states that it is synonymous that to *exclude*, as here compared, is to keep out what is already outside. Webster defines the word *suspend* as meaning, "to debar temporarily from any privilege, office, function, etc.; as to *suspend* a student. "Black's Law Dictionary (3rd Edition) defines *suspend* as, "to interrupt; to cause to cease for retirement; to stay, delay, or hinder; to discontinue temporarily but with an expectation or purpose of resumption. To forbid a public officer, attorney, employee, or ecclesiastical person from performing his duties or exercising his functions for a more or less definite interval of time." It seems that in common, as well as legal usage, there is an accepted difference and distinction between the term *exclude* and the term *suspend*. It further is urged by petitioner that it is implicit in the application of *suspend* that upon the expiration of the period of "temporary duration" there is an automatic reinstatement of function but that the common acceptance of the term *exclude* does not anticipate this occurrence and more generally appears to mean the "keeping out of that which is already outside."

The record in the instant case, considered by the tribunals below, includes (at every consideration) the decision of the First Assistant Commissioner of Pat-

ents and his subsequent inconsistent Order and reference to these was made at each stage for the purpose of having these tribunals give their consideration. "Record" within the definition of "plain or fundamental error" as "error apparent on the face of the record" includes pleadings, verdict and judgment." *Clymont* v. *First Nat. Bank*, 115 Tex. 342, 282 S.W. 558, (1926).

Petitioner submits that this matter is one which the courts below could and should have corrected in the course of their review. "Where error is manifest on the face of the record it is the duty of the Court to correct it, and it may do so on its own motion." *Duke* v. *Campbell*, 233 N.C. 262, 63 S.E. 2d 555, (1951). In considering appellate review generally, the Missouri Court stated: "(The) Appellate Court must examine transcript on appeal with respect to the presence of error of such character as (the) Court is entitled to consider and if error was committed materially affecting the merits of the action, (the) Appellate Court must give such judgment as the Trial Court should have given." *Tilson* v. *Terminal R. Ass'n. of St. Louis*, 236 S.W. 2d 42 (St. Louis Ct. App. 1951) [no official citation]. It would be difficult to imagine an instance in which an error apparent on the face of the record is more clearly illustrated than in the instance case where an order based on a previous decision is so obviously inconsistent therewith. In *Suydam* v. *Williamson*, 61 U.S. 427, 20 How. 427, 15 L. Ed. 978 (1858), this Court observed, "Wherever an error is apparent on the face of the record, it is open to revision, whether it be made to appear by a bill of exceptions or, in any other manner." Further, in *Suydam*, The Court went on to say, ". . . . any error apparent in any part of record is within the revisory power of such tribunal."

CONCLUSION

For the foregoing reasons and for those hereinbefore set forth in the Petition for Certiorari heretofore filed, petitioner respectfully submits that this petition should be granted.

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